

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Cr. No. 95-60120
	)	Civ. No. 01-6155
	)	
v.	)	ORDER
	)	
TIMOTHY WAYNE ARNETT,	)	
	)	
Defendant.	)	
	)	

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This court previously denied a section 2255 motion filed by defendant on the merits on August 20, 1998. The Ninth Circuit affirmed on appeal. On May 14, 2001, defendant filed a document entitled "First Motion to vacate, set aside and correct conviction pursuant to 28 U.S.C. § 2255." Defendant contends that his waiver of his right to counsel was not made intelligently and his sentence was unconstitutionally imposed beyond the

jury's findings in violation of Apprendi v. New Jersey, 120 S.Ct. 2348 (2000).

Petitioner, as noted above, has already sought relief under 28 U.S.C. § 2255.<sup>1</sup> Before a second or successive petition may be filed under section 2255, it must be certified by a Ninth Circuit panel as involving either newly discovered evidence or a retroactively applicable new rule or constitutional procedure. See 28 U.S.C. § 2255; 28 U.S.C. § 2244(b)(2). Petitioner has not obtained such certification from the Ninth Circuit. Therefore, this court lacks jurisdiction over the petition and the petition must be dismissed. Moreover, Apprendi has not been made retroactively applicable by the Supreme Court. Accordingly, the government's motion to deny defendant's second section 2255 petition is granted.<sup>2</sup>

#### CONCLUSION

For the reasons stated above, the government's motion to deny defendant's second section 2255 motion

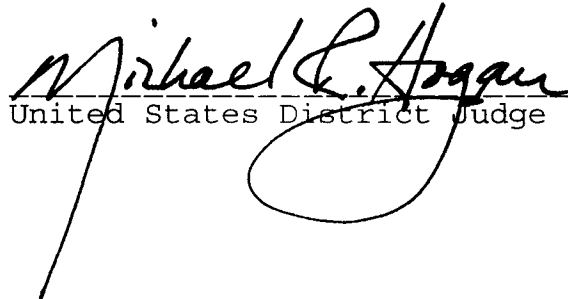
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<sup>1</sup>Contrary to defendant's argument, the court did have authority to consider the first section 2255 petition as it did not entertain the motion until after the judgment became final. The court also denied defendant's motion to recharacterize his first 2255 motion as a motion to dismiss.

<sup>2</sup>Even if the this court had jurisdiction to consider defendant's second petition, the court agrees with the government that the petition lacks merit and/or is procedurally barred for the reasons stated in the government's response to the petition (#238).

(#239) is granted and defendant's motion (#237) to vacate, set aside, or correct sentence is denied.

DATED this 30<sup>th</sup> day of September, 2005.

  
United States District Judge